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Supreme Court, U.S.
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No. 97-

In the Supreme Court of the United States

October Term, 1997

Edna T. Thompson, *Petitioner*

v.

Crawford W. Long, M.D., *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Georgia's five year statute of repose for medical malpractice claims violates the Equal Protection Clause of the Fourteenth Amendment in that it arbitrarily distinguishes medical malpractice claimants from all other personal injury claimants.

PARTIES TO THE PROCEEDING

The named petitioner, Edna Thompson, was the plaintiff below. The named respondent, Crawford W. Long, M.D., was the defendant below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edna Thompson respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Georgia in this case.

OPINIONS BELOW

The court of appeals' opinion in this case (App., infra, 3a-8a) is unreported. The court of appeals' order denying petitioner's motion for reconsideration (App., infra, 2a) is unreported. The Georgia Supreme Court's decision denying petitioner certiorari in this case (App., infra, 1a) is unreported.

JURISDICTION

The Court of Appeals of the State of Georgia denied petitioner's motion for reconsideration on March 26, 1997. On September 5, 1997, the Supreme Court of the State of Georgia denied petitioner certiorari. (App., infra, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall ... deny any person within its jurisdiction the equal protection of the laws."

STATEMENT

In this case, the petitioner's action based in medical malpractice was abrogated pursuant to Georgia's Statute of Repose,

O.C.G.A. §9-3-71(b). Section 9-3-71(b) states in full: "Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred."

The petition presents one question: (1) Whether Georgia's five year statute of repose for medical malpractice claims violates the Equal Protection Clause of the Fourteenth Amendment in that it arbitrarily distinguishes medical malpractice claimants from all other personal injury claimants.

The facts set forth below are taken from uncontroverted evidence found within the record on appeal.

1. The death of Brandon Thompson. On February 16, 1988, petitioner Edna T. Thompson was first examined by respondent Crawford W. Long, M.D. for the purposes of obtaining prenatal care. Pursuant to the examination, respondent determined that petitioner was pregnant and scheduled the delivery of her baby for September 1, 1988 at Crawford Long Hospital in Atlanta, Georgia. (R: 17). On May 5, 1988, a sonogram was taken of petitioner which showed a viable fetus. It was determined that a repeat C-section was unavoidable, and the petitioner was informed that her expected delivery date was now July 20, 1988. (R: 17).

During the month of July, 1988, petitioner complained to respondent that

she experienced a fainting spell, weakness, severe nausea, swelling of the hands and feet and retention of fluid. (R: 18 - 19). Respondent was clearly aware of the complications petitioner was experiencing with the pregnancy, yet failed on July 11, 1988 to exercise the degree and standard of care required by skilled physicians generally under similar conditions and like circumstances, thereby allowing petitioner's condition to worsen. (R: 18, 19, 20).

On July 25, 1988, a second sonogram procedure was performed at the Crawford Long Hospital emergency room in Atlanta, Georgia, and petitioner was scheduled for an emergency C-section. (R: 17). During the course of the July 25, 1988 C-section, petitioner's unborn child, Brandon Thompson, died. Petitioner contended that the death of Brandon Thompson was due to the negligent handling of her prenatal care. (R: 18).

2. Proceedings below. On July 25, 1990, petitioner Edna T. Thompson filed a tort action based in medical malpractice against respondent Crawford W. Long, M.D. (R: 40). Specifically, the lawsuit involved the prenatal care of petitioner and her deceased child. As outlined above, the care culminated in a surgical procedure on July 25, 1988 wherein the petitioner's child was delivered stillborn by caesarian section. Petitioner alleged that respondent failed to exercise a reasonable degree of medical care, diligence and skill ordinarily employed by obstetricians and gynecologists under similar conditions and like surrounding circumstances. (R: 44 -49).

On November 5, 1993, petitioner voluntarily dismissed the action pursuant to Official Code of Georgia, Annotated § 9-11-41. (R: 122).

On May 2, 1994, petitioner refiled her complaint, again alleging medical malpractice against respondent Crawford W. Long, M.D. (R: 16 - 22). And, on June 7, 1994, respondent filed a Motion to Dismiss, arguing that petitioner's refiled complaint was barred by Georgia's statute of repose for medical malpractice actions. (R: 38 - 42). Petitioner filed her response in opposition to respondent's Motion to Dismiss on July 6, 1994. (R: 57 - 59; 64 - 66).

On September 13, 1995, the Honorable Walter Lovett, sitting pro hac vice for Judge Thelma Cummings-Moore in the State Court of Fulton County, Georgia, granted respondent's Motion to Dismiss. (App., infra, 9a).

Petitioner appealed the trial court's ruling, arguing among other things that the five year statute of repose was unconstitutional in that it violated the Equal Protection Clause of the Fourteenth Amendment. On February 25, 1997, the Georgia Court of Appeals entered an order affirming the trial court's decision granting respondent's motion to dismiss. (App., infra, 3a-8a). Petitioner's motion for reconsideration to the Georgia Court of Appeals was denied on March 26, 1997. (App., infra, 2a).

On September 5, 1997, the Supreme Court of the State of Georgia denied petitioner's petitioner for certiorari. (App., infra, 1a).

REASONS FOR GRANTING THE PETITION

1. The constitutionality of statutes governing issues of medical malpractice is determined by tests of varying degrees within different jurisdictions.

Specifically, the State of Georgia has held that because medical malpractice claimants are not members of a suspect class they are not entitled to strict scrutiny. Indeed, the Georgia courts have held that the rational basis test is the appropriate test in determining whether statutes governing medical malpractice issues are constitutional. Craven v. Lowndes County Hospital Authority, 437 SE2d 308 (1993).

In contrast, the State of New Hampshire has determined that the rights of medical malpractice claimants are sufficiently important as to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test. Carson v. Maurer, 424 A2d 825 (1980). In furtherance of said resolution, the New Hampshire Courts have created an intermediate standard for determining the constitutionality of statutes that restrict the rights of medical malpractice claimants. To-wit, whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation. Id., at 831.

In Carson, the plaintiffs challenged the constitutionality of RSA ch. 507-C (Supp. 1979), governing actions for medical injury. This statute was part of

an effort by the New Hampshire legislature to address the problems of the medical injury reparations system. Among other things, the statute created a two-year statute of limitations applicable to most medical malpractice actions and limited the amount of damages recoverable for non-economic loss to $250,000.00. In its statement of findings and purpose, the New Hampshire legislature found, "... that substantial increases in the incidence and size of claims for medical injury pose a major threat to effective delivery of medical care in the state and that the risks and consequences of medical injury must be stabilized in order to encourage continued provision of medical care to the public at reasonable cost, the continued existence of medical care institutions and the continued readiness of individuals to enter the medical care field." Id., at 829, 830. The intent of RSA ch. 507-C was to stabilize the law governing medical malpractice actions and to improve the availability of adequate liability insurance for health care providers at reasonable cost. Id., at 830.

The plaintiffs in Carson asserted that the statute in question created an improper classification of medical malpractice claimants distinct from victims of any other type of negligence. In examining the particular statute, the Supreme Court of New Hampshire agreed with the plaintiffs, and found that the statute confers certain benefits on tortfeasors who are health care providers that are not afforded to other tortfeasors, and that it distinguishes between those tort claimants whose injuries were caused by medical

malpractice and all other tort claimants. Id., at 830.

Further, by applying the fair and substantial relation test, the Supreme Court of New Hampshire held that the two year statute of limitations imposed by RSA ch. 507-C was unconstitutional. Specifically, the New Hampshire Supreme Court noted in its decision that prior to the enactment of RSA ch. 507-C, there was a six year statute of limitations governing most personal actions, including malpractice actions. And, that upon the enactment of RSA ch. 507-C, medical malpractice claimants were required to bring an action within two years of the alleged negligence. There was one exception to this rule: If the action were based upon the discovery of a foreign object in the body, the discovery of which was not and could not reasonably have been made within that two year period, that particular claimant would have two years from the date of the discovery of the foreign object in the body, or two years from the date of the discovery of facts which would reasonably lead to the discovery of the object, to file an action. Id., at 833.

The New Hampshire Supreme Court held that RSA ch. 507-C was invalid insofar as it makes the discovery rule unavailable to all medical malpractice plaintiffs except those whose actions are based upon the discovery of a foreign object in the injured person's body. The discovery rule provides that a cause of action will not arise until the plaintiff discovers the injury, or, in the exercise of reasonable diligence, should have discovered the

injury and its cause. Id., at 833. The Court pointed out that the rule is premised on "the manifest unfairness of foreclosing an injured person's cause of action before he has had even a reasonable opportunity to discover its existence." Id., at 833, quoting Brown v. Mary Hitchcock Memorial Hosp., 378 A2d 1138, 1139-40 (1977).

In addition to arguing that the two year statute of limitations imposed by RSA ch. 507-C was unconstitutional, the plaintiffs in Carson asserted that the $250,000.00 damages cap provided by RSA ch. 507-C was unconstitutional in that it denied the plaintiffs equal protection of the law by creating an arbitrary damage limitation and thereby precluding only the most seriously injured victims of medical negligence from receiving full compensation for their injuries. Id., at 836.

The legislative purpose behind this section of the statute at issue was to stabilize insurance risks and reduce malpractice insurance rates. In applying the fair and substantial relation test, the New Hampshire Supreme Court held that this portion of the statute was unconstitutional. In making this determination, the Court found that the cap on damages distinguished between malpractice victims and victims of other torts, as well as distinguishing between malpractice victims with non-economic losses that exceed $250,000.00 and those with less severe non-economic losses. The Court determined that the necessary relationship between the legislative goal of rate reduction and the means chosen to

attain that goal was insufficient to uphold the statute. Specifically, the Court found that damage awards constitute only a small part of total insurance premium costs and that few individuals suffer non-economic damages in excess of $250,000.00. Id., at 836. As such, the portion of the statute being challenged failed the fair and substantial relation test.

The petitioner respectfully asserts that the analysis set forth in the Carson decision is both sound and reasonable. The petitioner further respectfully asserts that based upon the difference of opinions among the different jurisdiction, this Honorable Court must make a determination as to the appropriate level of judicial scrutiny to be applied when examining restrictions imposed upon the rights of medical malpractice victims. And, this petitioner respectfully asserts that the appropriate level of judicial scrutiny should be that of the fair and reasonable relation test as espoused by the New Hampshire Supreme Court.

2. Under the fair and reasonable relation test, Georgia's five year statute of repose delineated in the Official Code of Georgia Annotated § 9-3-71(b) is unconstitutional. Specifically, the statute of repose violates the Equal Protection Clause of the Fourteenth Amendment.

It is important to note that the Georgia Supreme Court has recognized its power to grant broader rights to its citizens under the Georgia Constitution than are granted to its citizens by the

U.S. Constitution. Craven v. Lowndes County Hospital Authority, 437 SE2d 308 (1993). And, in examining equal protection challenges, the Georgia Courts have chosen in the past to apply an intermediate level of scrutiny to situations other than those dealing solely with distinctions based upon gender and illegitimacy. Ponder v. Fulton-DeKalb Hosp. Auth., 353 SE2d 515 (1987). Additionally, even in cases where the Georgia Courts have allegedly applied the rational basis test, the analyses have been dependent upon the use of language normally restricted to intermediate judicial scrutiny. See, e.g., Smith v. Cobb County-Kennestone Hosp. Auth., 423 SE2d 235 (1992); Mansfield v. Pannell, 404 SE2d 104 (1991); Clark v. Singer, 298 SE2d 484 (1983); Allrid v. Emory Univ. 285 SE2d 521 (1982); Bickford v. Nolen, 240 SE2d 23 (1977).

Having established that it would be possible to do so, it is petitioner's contention, that Georgia's five year statute of repose should be subjected to an intermediate level of scrutiny, just as the New Hampshire medical malpractice statute discussed earlier was.

By applying the fair and substantial relation test that was set forth by the New Hampshire Supreme Court in the Carson decision, petitioner respectfully asserts that the five year statute of repose for medical malpractice claims in the State of Georgia is unconstitutional.

In examining the statute of repose, the Georgia Supreme Court has determined that the purpose of the legislation was to eliminate stale claims and to keep health

care affordable and accessible to the public. It has been noted that because of the nature of the practice of medicine, uncertainty over the causes of illness and injury make it difficult for insurers to assess premiums based on known risks. And, further, the passage of time makes it more difficult to determine the cause of injury, particularly in diseases where medical science cannot pinpoint the exact cause. Clark, 298 SE2d 484 (1983), Craven, 437 SE2d 308 (1993).

In order for the statute to be constitutional under the fair and reasonable relation test, it must be determined that the Georgia legislature's classification of medical malpractice plaintiffs is reasonable, not arbitrary, and bears a fair and substantial relation to the objectives outlined above. The petitioner respectfully states that it does not.

Petitioner asserts that many injuries may take more than five years after an act of medical malpractice to manifest. And, in their decisions reviewing the five year statute of repose, the Georgia Courts have not found any evidence that five years is the point at which elimination of many meritorious claims will significantly improve the problem of long-term liability. Hence, the election of the five year period is arbitrary, and it bears no fair and substantial relation to the purpose of the legislation. As such, the five year statute of repose is unconstitutional.

3. Petitioner respectfully asserts that the classifications set forth in Georgia's

five year statute of repose do not bear a rational relationship to the legislative purpose of the statute, and that the five year statute of repose is therefore unconstitutional.

Under the rational relationship test, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76 (1971). Petitioner respectfully asserts that the five year statute of repose for medical malpractice claims arbitrarily distinguishes her from all other personal injury claimants and that she therefore is not being treated like all other personal injury claimants.

It is petitioner's contention that the identified interests behind Georgia's five year statute of repose bear no rational basis to a legitimate end of government. Petitioner recognizes the importance of limiting the time frame in which an individual may bring an action. Certainly there is value in "wiping the slate clean" at a certain point in time. And, the petitioner agrees that without time limitations on actions, it would be difficult for insurance companies to accurately assess premiums. However, it is petitioner's contention that these goals are met by the applicable statute of limitations, the clear purpose of which being, to eliminate stale claims.

Additionally, the passage of time makes it more difficult to determine the cause of injury in all personal injury

claims, not just medical malpractice claims. As time passes, the recollection of plaintiffs and defendants alike fade, and both are required to rely more and more on documentation and other evidence and less on personal recollection in pursuing their claims and defenses. Petitioner respectfully asserts that it is nonsensical to assume that the passage of time affects medical malpractice cases more severely than other claims based in personal injury. Therefore, it is impossible to argue that the passage of time in a medical malpractice case is sufficient to subject such a claim to a statute of ultimate repose. There is no rational basis for subjecting a medical malpractice claim to such a statute when no other personal injury claims, all of which must weather the passage of time, are subject to such a statute.

The only valid basis for a statute of repose is in placing a time limit in which claims may be brought. Because the effective statute of limitations for personal injury claims already places a time limit on when medical malpractice actions may be brought, there is no rational reason for subjecting medical malpractice claims to a statute of ultimate repose when no other personal injury claims are subjected to one. In effect, Georgia statute of repose arbitrarily subjects medical malpractice claimants to treatment different from that received by all other personal injury claimants in the state of Georgia. There is no rational reason for the classification and the different treatment, and Georgia's statute of repose

therefore violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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December 1997

APPENDIX

IN THE SUPREME COURT OF GEORGIA

CLERK'S OFFICE

ATLANTA

EDNA T. THOMPSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO.
	)	S97C1205
CRAWFORD W. LONG, M.D.,	)	
	)	
Respondent,	)	
	)	

ORDER

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

SHERIE M. WELCH
Clerk

Date: September 05, 1997

IN THE COURT OF APPEALS

STATE OF GEORGIA

EDNA T. THOMPSON,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. A96A1997
	)	
CRAWFORD W. LONG, M.D.,	)	
	)	
Appellee,	)	
	)	

ORDER

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

WILLIAM L. MARTIN, III
Clerk

Date: March 26, 1997

IN THE COURT OF APPEALS

STATE OF GEORGIA

EDNA T. THOMPSON,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. A96A1997
	)	
CRAWFORD W. LONG, M.D.,	)	
	)	
Appellee,	)	
	)	

ORDER

On May 2, 1994, Edna Thompson sued Crawford W. Long, M.D. for "professional malpractice." In the complaint, Thompson alleged that "[o]n July 25, 1988, during the course of surgery, [her] unborn child died due to the negligent handling of her prenatal care." Long answered the complaint and filed a motion to dismiss, arguing that the action was barred by the five year statute of repose for medical malpractice actions. The trial court granted Long's motion to dismiss, and Thompson appeals. Thompson asserts that the trial court erred in dismissing her complaint because (1) the statute of repose for medical malpractice actions is unconstitutional, (2) her complaint alleged negligence as well as medical malpractice, and (3) her claims based on Long's intentional acts were not subject to the five year statute of repose. For reasons which follow, we affirm.

The record shows that Thompson

originally filed a pro se complaint for medical malpractice against Long July 25, 1990. (Although the trial court dismissed Thompson's original complaint due to her alleged failure to comply with O.C.G.A. § 9-11-9.1, we reversed that decision in Thompson v. Long, 201 Ga. App. 480 (411 SE2d 322) (1991)). After obtaining counsel, Thompson voluntarily dismissed that Complaint on November 4, 1993 and refiled it on May 2, 1994. Neither Thompson's refiled complaint, nor an amendment filed on August 2, 1994, allege that Long committed any negligent acts after the July 25, 1988 surgery.

1. The two year statute of limitations and five year statute of repose for medical malpractice actions are codified at OCGA § 9-3-71(a) and (b). Those subsections provide that "(a) [e]xcept as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death rising from a negligent or wrongful act or omission occurred. (b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred."

Thompson argues that "[t]he five year statute of repose is unconstitutional in that it arbitrarily distinguishes medical malpractice claimants from all other personal injury claimants and subjects medical malpractice claimants to abrogation of their claims." Our Supreme Court has already responded to the same

argument in ruling that OCGA § 9-3-71(b) is constitutional. Craven v. Lowndes County Hosp. Auth., 263 Ga. 657 (1) (437 SE2d 308) (1993). Accordingly, for the reasons discussed in Craven, Thompson's first enumeration of error is without merit. Id.

2. Before reaching the merits of Thompson's other assertions, we note the following. Although Thompson voluntarily dismissed and refiled her complaint within six months as provided for by OCGA §§ 9-11-41(a) and 9-2-61(a), such refiling did not put the refiled complaint "upon the same footing" as the original complaint. See Wright v. Robinson, 262 Ga. 844 (1) (426 SE2d 870) (1993). Because Thompson refiled her complaint more than five years after the date on which any alleged negligent or wrongful acts occurred, as discussed below, the claims presented are subject to dismissal under the statute of repose. See id. As stated by the Supreme Court in Wright, "the legislature never intended for the dismissal and renewal statutes to overcome the statute of repose." Id. at 846.

3. Thompson asserts that in addition to her medical malpractice claims, her complaint includes claims of simple negligence resulting in personal injuries that are not barred by the statute of repose. Specifically, Thompson asserts that her claims for emotional pain and suffering and emotional distress sound in simple negligence. We disagree.

OCGA § 9-3-70(1) defines an "action for medical malpractice" as "any claim for damages resulting from the death of or injury to any person arising out of: (1)

Health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such service ..."' A professional negligence action is a professional malpractice action that calls into question the conduct of a professional in his area of expertise. See Moore v. Louis Smith Mem. Hosp., Inc., 216 Ga. App. 299, 299-300 (454 SE2d 190) (1995).

In this case, Thompson alleged that Long determined she was pregnant after examining her and performing other diagnostic work. Thompson further claims that she informed Long of several symptoms she was experiencing and that, following two Sonograms, he performed an emergency c-section during which her "unborn child died due to the negligent handling of her prenatal care." Finally, Thompson alleged in her complaint that "[t]his action is one for professional malpractice in which [Long] failed to exercise the required degree and standard of care and caused injury to [her] from a want of such care and skill."

Although Thompson alleged she sustained various injuries resulting from Long's conduct, including those for emotional pain and distress, her complaint and the amendment to her complaint clearly allege that all such injuries resulted from Long's professional malpractice. Though it is true that any injury sustained under a doctor's care may be the result of simple negligence, (see id.), the record shows that Thompson did not assert any such claims in this case. Accordingly, we conclude that Thompson's

claims for emotional pain and distress sound in professional malpractice and are subject to the five year statute of repose.

4. In her last enumeration of error, Thompson asserts that her claim for punitive damages based on Long's alleged intentional acts was not subject to the five year statute of repose. Specifically, Thompson refers to the amendment to her complaint in which she alleged that Long's conduct "as described in the original Complaint establishes a conscious and wanton disregard for the life of the Plaintiff, individually and of the rights of the child[.]..." (Emphasis supplied) Because we find that such a claim was based on Long's alleged professional malpractice, we conclude that the claim is barred by the five year statute of repose (OCGA § 9-3-71(b)).

A claim for "professional malpractice" can be based on intentional acts. "Webster's Third International Dictionary defines 'malpractice' as 'a dereliction from professional duty whether intentional, criminal, or merely negligent by one rendering professional services that results in injury, loss, or damage to the recipient of those services...'" (Citation and punctuation omitted.) Hodge v. Hennings Mill, Ltd., 215 Ga. App. 507, 508 (451 SE2d 66) (1994) (emphasis supplied). Similarly, OCGA § 9-3-71 (a), which defines "medical malpractice," does not limit such claims to claims of professional negligence, but includes "any claim for damages" arising out of the defined provision of medical services. Moreover, the plain language of OCGA § 9-

3-71(b) shows that the statute of repose is not limited to professional negligence cases. Rather, OCGA § 9-3-71 (b) abrogates all claims "for medical malpractice ... brought more than five years after the date on which the negligent or wrongful act or omission occurred."

The mere fact that Thompson alleged that Long's conduct was intentional does not mean that her claims were not medical malpractice claims barred under OCGA § 9-3-71(b). To the contrary, the conduct upon which Thompson relies to establish her intentional tort claims, was "described in the original Complaint" as the "handling of her prenatal care." Such a claim is clearly including in the definition of "medical malpractice" under OCGA § 9-3-70(1). Accordingly, we conclude that Thompson's claims of intentional conduct were medical malpractice claims barred by the five year statute of repose. OCGA § 9-371(b). This conclusion is consistent with the intent of OCGA § 9-3-71(b) to establish a period of "ultimate repose and abrogation," "when past transgressions are no longer actionable." OCGA § 9-3-71(c); Craven, supra at 660. The statute stands as an "absolute" and "unyielding barrier to [Thompson's] right of action." Wright, supra at 845. The fact that Thompson was seeking punitive damages for these acts does nothing to change the result.

Judgement affirmed. Johnson, J., concurs. Presiding Judge McMurray concurs in the judgment only.

Date: February 25, 1997

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

EDNA T. THOMPSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	FILE NO.
CRAWFORD W. LONG, M.D.,	)	E-25037
	)	
Defendant.	)	
	)	

ORDER

This matter has come before this Honorable Court on Defendant's Motion to Dismiss. After considering the record, the briefs, the arguments of counsel and all other evidence properly before the Court, it appears that Defendant's Motion to Dismiss is supported by the law and the facts.

Wherefore, the Court **GRANTS** Defendant's Motion to Dismiss.

IT IS ORDERED, this 13 day of September, 1995.

WALTER LOVETT
JUDGE
Sitting Pro Hac Vice for
Judge Thelma Cummings-Moore
State Court of Fulton County

Date: September 13, 1995

Supreme Court, U.S.
FILED
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No. 97-921

In The

Supreme Court of the United States

October Term, 1997

EDNA T. THOMPSON,

Petitioner,

vs.

CRAWFORD W. LONG, M.D.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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Petitioner argues that the Georgia five year statute of repose provided for medical malpractice actions under O.C.G.A. § 9-3-71(b) violates her rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. Petitioner contends that the Court should apply an intermediate level of scrutiny in evaluating the constitutionality of Georgia's statute of repose. Alternatively, Petitioner argues that the statute of repose violates her equal protection rights under a "rational basis" analysis. As shown more fully below, the Georgia Supreme Court has previously upheld the constitutionality of the medical malpractice statute of repose on equal protection grounds in a manner consistent with opinions of the United States Supreme Court. Consequently, Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

Under Georgia law, an action for medical malpractice must be brought within two years of the injury or death resulting from the alleged malpractice, but in no event may an action be brought more than five years after the alleged negligent act or omission. O.C.G.A. § 9-3-71. This code section creates a two year statute of limitation and a five year statute of ultimate repose.

In *Craven v. Lowndes County Hosp. Auth.*, 263 Ga. 657, 437 S.E. 2d 308 (1993), the Georgia Supreme Court upheld the medical malpractice five year statute of repose under an equal protection challenge. Because the Plaintiff was not a member of a suspect class, the Court applied the "rational basis test." The Georgia Supreme Court upheld the constitutionality of the five year statute of repose, since it was rationally related to a legitimate government purpose not prohibited by the Constitution. The court found that the medical malpractice statute of limitation and statute of repose serve the purpose of eliminating stale claims. Also,

> [b]ecause of the nature of the practice of medicine, uncertainty over the causes of illness and injury make

> it difficult for insurers to adequately assess premiums based on known risks. Furthermore, the passage of time makes it more difficult to determine the cause of injury, particularly in diseases where medical science cannot pinpoint the exact cause.

Id. at 659. Therefore, the Georgia Supreme Court held the statute of repose to be reasonably related to a legitimate government purpose. *See also Waters v. Rosenbloom*, 268 Ga. 482 (1997).

The level of scrutiny applied by the Georgia Supreme Court in *Craven, supra*, is consistent with decisions of this Honorable Court in other cases evaluating equal protection challenges to state law under the Fourteenth Amendment. As a starting point, federal courts should presume that state legislatures have acted constitutionally in making laws. *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 89 S. Ct. 1404 (1969). Then, in evaluating state laws under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, it is necessary to apply different levels of scrutiny depending on the nature of the classification. "At a minimum, a statutory classification must be rationally related to a legitimate government purpose." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910 (1988), citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17(1973); *cf. Lyng v. Automobile Workers*, 485 U.S. 360, 370 (1988). Under the "rational basis" test, state statutes are presumed to be constitutional as long as the challenged classification is rationally related to some legitimate state interest, "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage, . . ." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 97 S. Ct. 2513 (1975).

"Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most

exacting scrutiny." *Clark, supra* at 461, citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 672 (1966). Under the "strict scrutiny" standard, a statute must be necessarily or narrowly tailored to achieve a compelling or overwhelming government purpose. *Id.*

Finally, an intermediate level of scrutiny has been applied generally to statutory classifications based on sex or illegitimacy. *Clark, supra* at 461, citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-724, and n.9 (1982); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Matthews v. Lucas*, 427 U.S. 429, 505-506 (1976). Under the intermediate level of scrutiny, a classification must be "substantially related" to the achievement of "important government objectives." *Craig, supra*, at 197.

Petitioner relies heavily on *Carson v. Maurer*, 120 N.H. 925, 424 A. 2d 825 (1980) to argue that the intermediate level of scrutiny should be applied in this case. Petitioner's reliance on *Carson* is misplaced, however, since *Carson* analyzes the constitutionality of a New Hampshire statute under the equal protection provision of the New Hampshire Constitution. The New Hampshire statute was not challenged under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as is the statute of repose in the present case. The *Carson* court recognized that, under Fourteenth Amendment analysis, the intermediate level of scrutiny has been restricted to classifications based on gender and illegitimacy. The *Carson* court held, "in interpreting *our state constitution*, however, we are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires." (emphasis added). *Id.* at 932. Therefore, *Carson* is inapplicable to Petitioner's challenge of the Georgia statute of repose under the equal protection guarantees of the Fourteenth Amendment to the United States Constitution, since the *Carson* court was applying the additional rights granted to New Hampshire citizens under the New Hampshire Constitution.

Petitioner also cites several Georgia Supreme Court opinions, in which she argues that the Georgia Supreme Court applied an intermediate level of scrutiny in analyzing various Georgia statutes. Again, Petitioner's reliance on these cases is misplaced. In each of the cases cited, the Georgia Supreme Court specifically stated that it was applying the rational basis test. *Ponder v. Fulton-Dekalb Hosp. Auth.*, 256 Ga. 833, 835, 353 S.E. 2d 515, 516 (1987); *Smith v. Cobb Co.-Kennestone Hosp. Auth.*, 262 Ga. 566, 569, 423 S.E. 2d 235, 238 (1992); *Mansfield v. Pannell*, 261 Ga. 243, 244, 404 S.E. 2d 104, 105 (1991); *Clark v. Singer*, 250 Ga. 470, 472, 298 S.E. 2d 484 (1983); *Allrid v. Emory Univ.*, 249 Ga. 35, 38, 285 S.E. 2d 521, 524 (1982); and *Bickford v. Nolan*, 240 Ga. 255, 256, 240 S.E. 2d 24, 26 (1977). Since none of the statutes analyzed in the previously cited cases involved suspect classifications nor fundamental rights, the Georgia Supreme Court upheld the statutes at issue in each case under the rational basis analysis.

Woodward v. Burnham City Hospital, 449 U.S. 807, 101 S. Ct. 54 (1980), dismissing appeal from *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E. 2d 560 (1979) is directly on point with the present case and provides an excellent historical analysis of the development of medical malpractice statutes of repose. In *Anderson*, the Supreme Court of Illinois upheld the Illinois two year medical malpractice statute of limitation and four year medical malpractice statute of repose under the equal protection clauses of both state and federal constitutions. The *Anderson* court provided a detailed analysis of the legitimate governmental purposes served by the medical malpractice statute of repose by applying the rational basis test. Moreover, the *Anderson* court cited a number of opinions from courts around the country upholding similar statutes against charges that a statute of repose violates equal protection. *Anderson*, *supra*, at 310. The United States Supreme Court dismissed the appeal in *Anderson* for want of a substantial federal question. *Woodward, supra*, at 807. A dismissal of an appeal for want of

substantial federal question is a decision on the merits of the case. *Ohio ex rel Eaton v. Price*, 360 U.S. 246, 79 S. Ct. 978 (1959); *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S. Ct. 2281 (1975). *See also Pullum v. Cincinnati, Inc.*, 475 U.S. 1114, 106 S. Ct. 1626 (1986), dismissing appeal from *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (1985). (Florida twelve year statute of repose in products liability cases upheld under rational basis test.); *Elerbee v. Otis Elevator Co.*, 459 U.S. 802, 103 S. Ct. 24 (1982), dismissing appeal from *Elerbee v. Otis Elevator Co.*, 618 S.W. 2d 870 (1981). (Texas ten year statute of repose in real property cases upheld under rational basis test).

As previously shown, the Court should not apply an intermediate level of scrutiny in analyzing the constitutionality of the Georgia medical malpractice statute of repose. Petitioner argues alternatively that the statute violates her equal protection rights guaranteed by the Fourteenth Amendment under the rational basis test. Petitioner asserts that the goal of eliminating stale claims is accomplished by the statute of limitation and that other types of personal injury claims are not subject to similar statutes of repose. Contrary to Petitioner's position, see *Woodward v. Burnham City Hosp.*, 79 Ill. 2d 295, 402 N.E. 2d 560 (1979), for a detailed discussion of the unique "long tail" problem found in medical malpractice cases and the legitimate role statutes of repose play in addressing the problem. Additionally, the Petitioner admits that legitimate government purposes are served by the statute of repose, such as "limiting the time frame in which an individual may bring an action," " 'wiping the slate clean' at a certain point in time," and allowing "insurance companies to accurately access premiums." Page 12, Petition for Writ of Certiorari. Petitioner simply questions the legislative method of attaining these goals.

Petitioner's arguments against the statute of repose exceed the permissible scope of equal protection analysis under the rational basis test.

> [A] state does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequity." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 . . . [The rational-basis standard] is true to the principal that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

City of Dallas v. Stanglin, 490 U.S. 19, 26-27, 109 S. Ct. 1590 (1989).

CONCLUSION

The Georgia medical malpractice five year statute of repose under O.C.G.A. § 9-3-71 is rationally related to a legitimate government purpose, and as such, it satisfies the Petitioner's rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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